IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01/04/2003

CORAM

THE HONOURABLE MR.JUSTICE V.KANAGARAJ

CRIMINAL ORIGINAL PETITION NO.2631 OF 2003.

M/s.Rita Agencies,
Chennai-24, rep. by its
Partner
Rajan Syal. ... Petitioner

-Vs-

1. The Enforcement Officer,
Employees provident Fund
Organisation,
Chennai-14.

2. The Deputy Commissioner of
Police,
Central Crime Branch,
Egmore,
Chennai-8. ... Respondents

Petition filed under Section 482 of the Criminal Procedure Code,
praying for the relief as stated therein.

For petitioners: Mr.M.Aravind Subramaniam

For respondents: Mr.V.Vibishanan for R.1
Mr.O.Srinath,
Govt. Advocate for R.2.

:O R D E R

This petition has been filed praying to quash the complaint No.TN/1 9783/Ch.II/Reg1/2002 dated 10.01.2003 made by the first respondent to the second respondent herein against the petitioner to prosecute for the offence alleged under Sections 406 and 409 IPC for breach of trust for non-payment of Employees Provident Fund, on the following grounds:-

(a) that the impugned complaint is mala fide as it has deliberately suppressed the pendency of writ proceedings before this Court in W.M. P.No.30981 of 2002 in W.P.No.22422 of 2002 relating to the same alleged demand; (b) that the

impugned complaint is not maintainable as it lacks the basic ingredients of mens rea necessary for IPC offences; (c) that the impugned complaint is illegal as it suffers from the vice of the Principles of "Double Jeopardy" when the special provision of the Employees Provident Fund and Miscellaneous Provisions Act, 1952 (hereinafter referred to as the `Act')make the non-payment of Provident Fund dues as an offence u/s.14(2A) r/w. 14AB, the petitioner cannot be prosecuted for the same offence under the provisions of the IPC; (d) that the complaint is not maintainable as also for the reason that it has been instituted upon a complaint made by a person, who is not the properly authorised person on this behalf under the Act; (e) that the impugned complaint ought to be quashed since the element of entrustment is totally absent; (f) that the other ingredient, viz., " with a view to cause wrongful loss or gain" is also not there and that the complaint has been filed only after the writ petition was admitted and notice has been received by the first respondent.

2. On the contrary, the complaint lodged by the Employees Fund Organisation Regional Office, Tamil Nadu Region before the second respondent against the petitioner herein as the accused would highlight the failure to pay the employees' share of contributions under the Employees Provident Fund on the part of the petitioner agencies which were deducted from the salaries of their employees on ground that the petitioner agencies is an `establishment' covered under the provisions of the Act; that under Para 38(1) of the Employees Provident Funds Scheme, 1952 framed under the said Act, the employer in relation to an establishment covered under the Act is required to deduct the members' share of provident fund contribution from the wages of member employees and remit the amount into the State Bank of India to the credit of Employees Provident Fund Account within fifteen days from the close of the month succeeding the month for which the contributions were deducted; that Para 32(3) of the Employees Provident Funds Scheme, 1952 stipulates that any sum deducted under the scheme by an employer from the wages of an employee shall be deemed to have been entrusted to him for the purpose of paying the contributions into the Fund in respect of which it was deducted; that by Central Act No.40 of 1973, which came into force with effects from 1.11.1973, the following explanation have been added to Section 405 of the Indian Penal Code:

"A person being an employer who deducted the Employees' Contributions from the wages payable to the employee for credit to Employees' Provident Fund established by law for the time being in force, shall be deemed to have been entrusted with the amount of the contributions so deducted by him and if he makes default in the payment of such contributions to the said fund in violation of the said law shall be deemed to have been dishonestly used the amount of the said contribution in violation of law as aforesaid."

3. Extracting the above explanation, the complaint would further state that the petitioner/employer has deducted the members' share of Provident Fund contributions from the wages of the employees' from November, 1999 to June, 2002 to the tune of Rs.4,29,980/=, but these amounts deducted from the employees' have not been remitted to the Employees Provident Fund accounts maintained in the State Bank of India and hence the

petitioner/accused have committed the offences punishable under Sections 406 and 409 of the IPC and hence would request the respondent to register the case under those provisions of law.

4. During arguments, the learned counsel appearing on behalf of the petitioner reiterating the same points brought forth in the above criminal original petition would also cite a judgment of the Honourable Apex Court delivered in MADHAVRAO JIWAJI RAO SCINDI AND ANOTHER ETC vs. SAMBHAJIRAO CHANDROJIRAO ANGRE AND OTHERS ETC. reported in AIR 19 88 SC 709 wherein it has been held:

"The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

5. Yet another judgment relied on by the learned counsel for the petitioner is one delivered by the Honourable Apex Court in ASHIM K. ROY vs. BIPINBHAI VADILAL MEHTA AND OTHERS reported in Volume 91-1998 Reports of Company Cases, Page 1, wherein the Honourable Apex Court, adhering to the facts of the case handled by it, wherein the person who is alleged to have received money on behalf of the company was not a Director at relevant time but became Director thereafter, held that it is not a case of criminal breach of trust and no offence under Sections 120-B and 409 IPC was made out. Based on these judgments, the learned counsel would seek to the relief extracted supra.

6. On the part of the learned standing counsel for the first respondent and the learned Government Advocate on the criminal side appearing on behalf of the second respondent, they would lay emphasis on the complaint lodged by the first respondent before the second respondent since the same is bearing specific allegations of collection of the Employees Provident Fund amounts from the employees by the petitioner/employer making deductions from their salaries to the tune of Rs.4,29,980/= but defaulted in the payment of such contributions to the fund, in violation of relevant provisions of the Act and since being a clear cut violation of law, the complaint has to be registered both under Sections 406 and 409 IPC and has to be investigated into and there is absolutely no legal impediment in the same and would pray to dismiss the above criminal original petition as without merit.

7. In consideration of the facts pleaded, having regard to the materials placed on record and upon hearing the learned counsel for both, the main grounds of pleadings and arguments put forth on the part of the

petitioner herein are dual in nature, the first one being `the doctrine of double jeopardy' stating that when special provision is made under the Act under Sections 14(2A) and 14AB of the Act, the petitioner cannot be prosecuted under the provisions of the IPC. The second one is that the element of entrustment is totally absent in this case besides the ingredient `with the view to cause wrongful loss or gain' is absent in the complaint registered by the first respondent and that this complaint has been lodged only after the writ petition was admitted.

8. So far as the first point raised on the part of the petitioner i.e. `the doctrine of double jeopardy' is concerned, it is embodied in Article 20(2) of the Constitution of India which is specific to the effect that `no person shall be prosecuted and punished for the same offence more than once'. So far as the case in hand is concerned, it is the argument of the petitioner that when there is an enabling Section and Sections 14(2A) and 14AB of the Act covering the nonpayment of the provident fund dues, the first respondent has given the complaint making out a case under Sections 406 and 409 IPC also and therefore Article 20(2) of the Constitution of India is attracted.

9. First of all, neither there are two proceedings initiated nor is there any possibility for the petitioner to be prosecuted and punished twice for the same offence, which is prohibited by the Constitution of India. But, at the same time, there is absolutely no impediment for any provision under the Special Act to go along with the relevant Sections of the IPC if offences are made out under the provisions of the IPC also and therefore the act of either independently owned provisions of the Act or along with the IPC Sections conjointly being prosecuted and punished, it cannot constitute either prosecution or punishment twice for one and the same offence since altogether they would only make a single prosecution and punishment, in case the Court arrives at such conclusions.

10. The learned counsel for the petitioner would loiter much about non-prosecution of the petitioner under Sections 14(2A) r/w.14AB of the Act. It must be noted that the case is yet to be registered by the second respondent who will be at liberty to register the case under such provisions of law as aforementioned and to investigate into the facts and circumstances of the case and if a case is made out, to lay the charge on such relevant provisions of law before the jurisdiction Court. Even that is not final so far as the charges are concerned since based on the materials collected on the part of the prosecuting authorities, they would file the charge-sheet and it is upto the jurisdiction Court to frame the charges ultimately based on the materials made available before it prior to commencing the trial and to attain this stage, a very long way is still to go and therefore it is a premature stage at which all these arguments could be placed before this Court for a quash of the complaint which has been lodged for further processing in the manner provided for by law. Therefore, it is safe to conclude that there is absolutely no flaw in filing the complaint under the provisions of the IPC nor the principles of `double jeopardy' would creep in under such circumstances and hence this argument put forth on the part of the petitioner becomes liable only to be rejected.

11. Coming to the second point raised on the part of the petitioner that the element of entrustment is totally absent in the complaint and therefore no prosecution could be launched, it could very well be answered by citing Explanations 1 and 2 to Section 405 IPC which are extracted hereunder:

"Explanation 1 - A person, being an employer, who deducts the employees contribution from the wages payable to the employee for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be deemed to have been entrusted with the amount of contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used, the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2 - A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees State Insurance Corporation established under the Employees' State Insurance Act (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid."

No further explanation need be necessary since the above explanations are self-explanatory for the element of entrustment that is pleaded on the part of the petitioner.

12. The other point conjoin herein that the ingredient of wrongful loss or wrongful gain is not there, cannot be answered at this primitive stage since on the very face of the complaint, it is vivid that the wrongful loss has been caused to the first respondent to the extent of Rs.4,29,980/= and it is automatic that the petitioners are construed to have obtained the wrongful gains by such of their acts.

13. The petitioner would also point out that a writ petition has been admitted and notice has been received by the first respondent and therefore the complaint cannot be lodged during the pendency of the writ petition and hence would plead to quash the same. Any writ petition filed before this Court as it is said to have been done by the petitioners, cannot, in any manner, by the reason of the same being filed and admitted, would obstruct any criminal complaint to be lodged in such matters as it has been resorted to in the case in hand, unless, there is any specific order against either filing of such complaint or registering a case or investigating the same and therefore taking on file a writ petition said to have been filed by the petitioner is not an impediment for proceeding with the complaint lodged by the first respondent and this argument also does not hold water and becomes liable to be rejected.

14. Regarding the judgments cited on the part of the learned counsel for the petitioner, the first judgment is general in nature and does not, in any manner, deal with the facts of the case in hand and the second judgment has also been delivered completely under different facts and circumstances and therefore the principles laid down in those judgments by the Honourable Apex Court cannot be applied to the facts of the case in hand.

15. On a overall consideration of the facts and circumstances encircling the whole case as put up on the part of the petitioner in the above criminal original petition, there is no merit in the same for the prayer to be answered in the affirmative and the same become only liable to be dismissed and hence the following order:

In result, the above criminal original petition does not merit acceptance and it becomes liable only to be dismissed and the same is dismissed accordingly.

Index: Yes
Internet: Yes
Rao

To
1. The Enforcement Officer,
Employees provident Fund
Organisation,
Chennai-14.

2. The Deputy Commissioner of
Police,
Central Crime Branch,
Egmore,
Chennai-8.

3. The Public Prosecutor,
High Court, Madras.

4. Mr.O.Srinath,
Government Advocate (crl.side),
High Court, Madras.

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